Senate Rules Committee
Hearing on "Examining the Filibuster: Silent Filibusters, Holds, and the Confirmation Process"
June 23, 2010
Opening statement of Senator Tom Udall

Thank you, Mr. Chairman, for holding this hearing.

Over the past few months during this series of hearings, we've discussed and debated example after example of how the filibuster in particular – and the Senate's incapacitating rules in general – too often stand in the way of achieving real progress for the American people.

Today's topic – secret holds and the confirmation process – is just one more example of how manipulation of the Rules continues to foster a level of gridlock and obstruction unlike any we've seen before.

I want to commend Senator McCaskill for her dedication to transparency in government. Her fight to end the practice of secret holds is a worthy one that I wholeheartedly support. Earlier this year I was proud to sign on to Senator McCaskill's letter to the Majority and Minority leaders, in which we pledged to no longer place anonymous holds … and asked for Senate leadership to end the practice altogether.

Today … as we will hear from Senator McCaskill … she has gathered enough support to surpass the 67-vote threshold required to consider and amend the Senate rules. That is no small task, as everyone on this committee would attest.

She should be congratulated for her work … as should all of our colleagues – Democrat and Republican – who have signed on to this effort. This bipartisan effort is proof that we ARE capable of working together.

But the mere fact that we have to have this conversation … that Senator McCaskill had to work for months for 67 votes to change rules that the Constitution clearly authorizes us to do with a simple majority vote, illustrates that secret holds are just another symptom of a much larger problem.

That problem is the Senate rules themselves.

The current rules – specifically Rule V and XXII – effectively deny a majority of the Senate the opportunity to ever change its rules … something the drafters of the Constitution never intended.

As I've explained numerous times throughout this series of hearings, a simple majority of the Senate can adopt or amend its rules at the beginning of a new Congress because it is not bound by the rules of the previous Congress.

Many colleagues, as well as constitutional scholars, agree with me. It is through this path – by a majority vote at the beginning of the next Congress – that we can reform the abuse of holds,

secret filibusters, and the broken confirmation process. We can end the need for multiple cloture votes on the same matter, and we can instead begin to focus on the important business at hand.

Now, critics will argue that the two-thirds vote requirement for cloture on a rules change is reasonable. They'll say that Senator McCaskill managed to gather 67 Senators, so it must be an achievable threshold.

As I said a moment ago, I commend Senator McCaskill for her diligence in building support to end secret holds. But I think it is also important to understand that other crucial reform efforts have failed because, inexplicably, it takes the same number of Senators to amend our rules as it takes to amend the United States Constitution.

The effect of holds, on both legislation and the confirmation of nominees, is not a new problem. In January 1979, Senator Byrd – then Majority Leader – proposed changing the Senate Rules to limit debate to 30 minutes on a motion to proceed. Doing so would have significantly weakened the power of holds – and thus curbed their abuse.

At the time, Leader Byrd took to the Senate Floor and said that unlimited debate on a motion to proceed, quote, "makes the majority leader and the majority party the subject of the control and the will of the minority. If I move to take up a matter, then one senator can hold up the Senate for as long as he can stand on his feet."

Despite the moderate change that Senator Byrd proposed, it did not have the necessary 67 votes to overcome a filibuster.

Efforts to reform the motion to proceed have continued since.

In 1984, a bi-partisan study group recommended placing a two-hour limit on debate of a motion to proceed. That recommendation was ignored.

And in 1993, Congress convened the Joint Committee on the Organization of Congress to determine how it can be a better institution. Senator Pete Domenici, my immediate predecessor, was the co-vice chairman of the committee.

At a hearing before the Committee, he said, Quote "If we abolish [the debatable motion to proceed], we have gone a long way to diffusing the validity of holds, because a hold is predicated on the fact that you can't get [a bill] up without a filibuster, and if you take that away from the inception and then establish some kind of guidelines, I think that we will be moving in the right direction." End quote.

Despite a final recommendation of the joint committee to limit debate on a motion to proceed, nothing came of it.

And here we are again today – 31 years after Senator Byrd tried to institute a reform that members of both parties have agreed is necessary.

Talking about change, and reform, does not solve the problem. We can hold hearings, convene bi-partisan committees, and study the problem to death. But until we agree that the Constitution provides the right for each Senate to adopt its rules of proceedings by a simple majority vote, there will be no real reform.

Thank you again Mr. Chairman, and I ask unanimous consent that an April 19 Roll Call article titled, "In Senate, 'Motion to Proceed' Should be Non-Debatable" be included with my statement in the record.

Stevenson: In Senate, 'Motion To Proceed' Should Be Non-Debatable

April 19, 2010
By Charles A. Stevenson
Special to Roll Call

There's a simple step the Senate could take that would prevent a lot of the current delay and obstruction, while still permitting lawmakers to debate some controversial matters at length.

The "motion to proceed" should be made non-debatable and subject to an immediate majority-rule vote.

This may seem like an arcane parliamentary matter, but in practice the chance to kill a bill or nomination before it is open to debate and amendment is a key weapon in the hands of obstructionists. They don't even have to oppose the measure; they just argue that "now is not the time" to take it up. In fact, in the past 20 years, more than one-fourth of the cloture petitions to end debate have been on motions to proceed.

Maybe the Senate, under pressure from voters and stymied by the recent surge in filibusters, will change or repeal the current rule that requires a 60-vote supermajority to cut off debate. But that isn't likely, since it takes 67 votes to change the rules and since all Senators can envision circumstances when they might want to fight even though outnumbered.

Even if lawmakers eliminated the 60-vote rule, obstructionists would retain numerous tools to block or delay action.

A compromise might be found on the motion to proceed, which would have substantial additional benefits while still preserving the right of extended debate on substantive matters.

Right now, the motion to take up legislation is non-debatable only in very special circumstances: if the Senate has adjourned rather than recessing at the end of the previous day, if it has a period of morning business the next day and if it is in the second hour of the session. Even then, the bill goes back to the calendar if debate continues at the end of morning business.

The biggest problem in the Senate's current rules isn't that the majority can't work its will, but that a handful of Senators can clog the legislative stream, preventing action even on broadly supported measures.

Cutting off debate requires a day's wait after the first cloture petition is filed, and then 30 more hours of debate even if cloture is invoked. This means that the leadership needs at least four days just to end debate on the motion to proceed, plus many more on controversial amendments.

Four days on one measure is four days that can't be devoted to other matters — and the Senate has averaged only 167 days in session each year this decade.

Making the motion to proceed non-debatable would not only reduce the opportunities for filibusters but would also end the practice of individual "holds" on bills and nominations.

Those holds aren't in the rules, but they are the result of rules that require, for example, the Senate to take up bills and nominations in the order they were added to the calendar — that is, oldest first, with more urgent matters or more recent versions delayed until all previous matters have been disposed of.

A non-debatable motion to proceed could still be rejected by majority vote, and a matter being debated could still be filibustered, but the opponents would have to muster their troops, whereas now a single Member can hold the whole Senate hostage.

There are other rules changes that the Senate might adopt to have a more orderly and businesslike legislative process.

It could change the rule (XIX) that requires that "all debate shall be germane and confined to the specific question then pending before the Senate" for only the first three hours and it could enforce more rigorously the section of that rule that "no Senator shall speak more than twice upon any one question in debate on the same legislative day."

Senators could also drop the provision saying that the rules continue from one Congress to another unless changed by a two-thirds vote. That was added in 1959 under pressure from Senators fighting civil rights bills in order to overturn a ruling that would have allowed each new Congress to adopt rules by majority vote – as the House of Representatives does every two years.

But if Senators are unwilling to change the basic rule on filibusters, they should at least make the motion to proceed non-debatable so that the Senate can get to work without petty delays.

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